Joseph DiBella
Assistant General Counsel – Regulatory

1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Phone 703 351-3037
Fax 703 351-3676
joseph.dibella@verizon.com

May 13, 2004

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Verizon Telephone Companies Petition for Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157

Dear Ms. Dortch:

On May 12, 2004, Susanne Guyer, Edward Shakin and Joseph Dibella, representing Verizon, met with Chris Libertelli of Chairman Powell's to discuss the attached document.

Please let me know if you need any further assistance.

Sincerely,

/s/Joseph Dibella

Attachment

cc: C. Libertelli

"RAO 20" Tariff Investigation

This investigation concerns Verizon's and other ILECs' calculations, for the period 1993-1996, of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules. The Commission's rules in effect during that period expressly defined the interstate rate base. Section 65.800 stated that the "rate base *shall consist of* the interstate portion of the *accounts listed in § 65.820 . . . , minus* any deducted items computed *in accordance with § 65.830.*" 47 C.F.R. § 65.800 (1996) (emphasis added). Section 65.830, in turn, required deductions for five specified accounts, based on the Uniform System of Accounts set forth in 47 C.F.R. part 32, *see id.* § 65.810, and provided a methodology for calculating the interstate portion of those accounts, *see id.* § 65.830. With respect to one of those five accounts — Account 4310 — carriers were directed to deduct from the rate base only the "interstate portion of unfunded accrued pension costs." *Id.* § 65.830(a)(3). OPEBs, by definition, are post-retirement employee benefits *other* than pensions, and therefore were not covered by § 65.830(a)(3). *See Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 168 (D.C. Cir. 1994) ("The 'other,' which explains the 'O' in the OPEB acronym, is intended *to exclude pension benefits*; what is left generally consists of retirees' life insurance and medical and dental care benefits.") (emphasis added).

This investigation is referred to as "RAO 20" because, in 1992, the Common Carrier Bureau issued an advisory letter entitled RAO 20 instructing carriers to deduct OPEB liabilities from the rate base.[1] This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order vacating RAO 20, on the ground that the regulations "define[d] explicitly those items to be . . . excluded from[] the interstate rate base" and the Bureau's

[1] 7 FCC Rcd 2872 (1992).

requirement to exclude OPEBs "directed [an] exclusion[] from . . . the rate base *for which the Part 65 rules do not specifically provide*."[2] In the same order, the Commission proposed an amendment to its rules to require such deductions, but carriers had to file their 1996 annual access tariffs before the Commission completed that rulemaking. In those tariffs, they followed the *RAO 20 Rescission Order* and, in calculating their sharing obligations for 1996, reversed their deduction of OPEB liabilities for the prior years' rates of return. In 1997, the Commission finalized the rulemaking and amended § 65.830 to require the deduction of OPEB liabilities from the rate base.[3] The Commission also denied a request for reconsideration of the *RAO 20 Rescission Order* and reaffirmed that "[g]iving rate base recognition to OPEB in Part 65," as RAO 20 did, "constitute[d] a *rule change*" and therefore could not be accomplished "through an interpretation" of the rules in effect from 1993-1996. *RAO 20 Rulemaking* ¶¶ 25, 28 (emphasis added).

The Commission's amendment to § 65.830 applies only prospectively. Absent express authorization from Congress — and there is none here — an agency has no authority to promulgate a rule that would retroactively "'increase a party's liability for past conduct.'" *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588-89 (D.C. Cir. 2001) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)); *see General Motors Corp. v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) ("a grant of legislative rulemaking

---

[2] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957, ¶ 25 (1996) (emphasis added) ("*RAO 20 Rescission Order*").

[3] *See* Report and Order, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd 2321 (1997) ("*RAO 20 Rulemaking*"). Section 65.830(a)(3) now requires deduction of the "interstate portion of other long-term liabilities."

authority will not be understood 'to encompass the power to promulgate retroactive rules unless that power is conveyed in express terms.'") (quoting *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988)). Because applying its 1997 amendment to § 65.830 to require refunds for a tariff filed *in 1996* would have precisely that prohibited effect, the Commission cannot rely on its decision in the *RAO 20 Rulemaking* in resolving its investigation of Verizon's 1996 tariff filings. Indeed, at the time of the *RAO 20 Rulemaking*, AT&T conceded that "any change to the Part 65 rules will affect the rate base on a prospective basis and *will not affect the pending OPEB investigations*." *RAO 20 Rulemaking* ¶ 22 (emphasis added).

Nor is the Commission free to "re-interpret" the Part 65 regulations in place prior to 1997 to compel additional deductions from the rate base beyond those specified in the rules. As described above — and as the Commission has held — the rate base rules "define[d] explicitly those items to be included in, or excluded from, the interstate rate base" *RAO 20 Rescission Order* ¶ 25. In other words, as the Commission has explained, the "rate base rules . . . list the Part 32 accounts that *are to be included in and excluded from* the rate base." *Id.* ¶ 1 n.3 (emphasis added); *accord RAO 20 Rulemaking* ¶ 9 n.16. Indeed, the rules in effect in 1996, by their terms, were mandatory and precluded carriers from including in — or excluding from — the rate base any items not expressly set forth in those rules. Thus, § 65.800 states that the "rate base *shall* consist" of specified portions of "the accounts *listed in* § 65.820," less any deductions "computed *in accordance with* § 65.830." 47 C.F.R. § 65.800 (1996) (emphases added); *see, e.g., Association of Am. R.R. v. Costly*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) ("'shall' is the language of command"). Similarly, § 65.830 states that the "following items *shall* be deducted from the interstate rate base." 47 C.F.R. § 65.830 (1996) (emphasis added). Nothing in the text

of the rules suggests that there exist other, unspecified amounts that a carrier may be required to include in, or deduct from, the rate base.[4]

Moreover, the Commission has already *twice* held that those rules could *not* be interpreted to require the deduction of OPEBs. *See RAO 20 Rescission Order* ¶ 25 ("the Part 65 rules do not specifically provide" for deduction of OPEBs); *RAO 20 Rulemaking* ¶¶ 25, 28 (requiring deduction of OPEBs "constitute[d] a rule change" and could not be accomplished "through an interpretation" of the existing rules). Having thus "give[n] its regulation an interpretation," the Commission "can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see, e.g., Air Transport Ass'n v. FAA*, 291 F.3d 49, 56-57 (D.C. Cir. 2002); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622,

---

[4] AT&T claims that the Commission has "*never* read the Part 65 list of inclusions and deductions to be . . . exclusive," AT&T Ex Parte, CC Docket Nos. 93-193 *et al.*, at 2-3 (filed Apr. 13, 2004), but the only decision that AT&T cites — involving an investigation of an Ameritech tariff — actually supports Verizon's position. In adopting the Part 65 rules in 1987, the Commission, among other things, "reaffirmed its policy, first adopted in 1977, of excluding 'non-cash' items" from the "lead-and-lag calculations" used to determine cash working capital. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990). BellSouth sought reconsideration of the Commission's decision, which it described as "exclu[ding] . . . non-cash items," such as "the cost of common stock equity," from cash working capital calculations Order on Reconsideration, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 4 FCC Rcd 1697, ¶ 24 (1989). The Commission denied BellSouth's petition, finding that it had correctly excluded equity expenses, and other non-cash items, from its cash-working-capital rule. *See id.* ¶¶ 28-32. Ameritech, however, later claimed that the 1989 order denying reconsideration was the "first time" the Commission held that equity was among the non-cash expenses excluded from cash working capital and, therefore, that Ameritech properly included an "equity component in its [1988] cash working capital." Order to Show Cause, *Ameritech Telephone Operating Companies*, 10 FCC Rcd 5606, App. A, ¶ 5 (1995). The Commission rejected that claim, explaining (as BellSouth had recognized) that its "cash working capital" rules had "always" been limited to "*cash* expenses." *Id.* ¶ 6 (emphasis added). The Commission thus did not, as AT&T claims, *add* a new requirement to its rate base rules during a tariff investigation; it instead rejected a carrier's misinterpretation of those rules. *See id.* (holding that its rules "cannot logically or legally be relied upon to justify including equity in [pre-1989] calculations").

629 (5th Cir. 2001); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). As explained above, such a new regulation can apply prospectively *only*. In any event, even if the Commission could change its interpretation of § 65.830(a)(3) retroactively, this tariff investigation is not the type of rulemaking that would permit the Commission formally to modify a regulation or a prior interpretation of a regulation. *See* Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 4861, ¶¶ 7-8 (1990) ("*Special Access Tariffs Order*") ("Section 204(a) are rulemakings of particular applicability," in which the Commission "merely applies the obligations imposed by the statute or *previously adopted Commission rules* to particular carrier conduct") (emphasis added); *see also Southwestern Bell*, 28 F.3d at 169 (Commission, in tariff investigation, "was bound to follow [existing rules] until such time as it altered them through another rulemaking").

The Commission cannot evade this limitation by suggesting that, because different accounting rules applied to OPEBs when the Commission promulgated its rate base rules, the Commission now has discretion in the context of a tariff proceeding to find that a carrier's treatment of OPEBs was not just and reasonable. When the Commission promulgated those rules in 1987, no different from today, Account 4310 included not only "amounts accrued . . . [for] unfunded pensions," but also "other long-term liabilities not provided for elsewhere." 47 C.F.R. § 32.4310(a) (1987). In its Notice of Proposed Rulemaking, the Commission proposed to define the amounts to be deducted from the rate base as the "interstate portion of zero-cost funds," defined as "*all* funds . . . provided to a carrier without cost to the carrier." *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Bases and Net Incomes of Dominant Carriers*, 2 FCC Rcd 332, App. A (1986) (proposed 47 C.F.R. §§ 65.810(b),

65.830) (emphasis added). Such a rule, if adopted, would have included not only pensions, but also any zero-cost "other long-term liabilities" that might be included in Account 4310. But the Commission did not adopt its proposed rule. Instead, it replaced its broad, all-zero-cost-funds proposed rule with a rule listing the specific portions of specific accounts that "shall" be deducted from the rate base — including the "interstate portion of unfunded accrued pension costs (Account 4310)," but not any other portion of that account. Report and Order, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 3 FCC Rcd 269, Appendix B (1987) ("*Rate Base Components Order*") (promulgating 47 C.F.R. § 65.830).

Therefore, long before the Commission approved a change to the accounting rules for OPEBs, the rate base rules singled out pension expenses for special treatment — deduction from the rate base — that did not apply to analogous "other long-term liabilities" included in Account 4310. And when the Commission upheld the portion of RAO 20 that required carriers to include OPEBs in Account 4310, it explained that this account includes "amounts accrued for such items as . . . other long-term liabilities not provided for elsewhere in Part 32" and that "[u]nfunded OPEB liabilities fall into this category." *RAO 20 Rescission Order* ¶ 25. In other words, the Commission held that OPEBs are among the portions of Account 4310 that expressly are *not* required to be deducted from the rate base. As the Commission previously recognized, it could not require deduction from the rate base of one of these "other long-term liabilities" — namely, OPEBs — "through an interpretation" of its existing rules, but instead "a rule change" would be required to give "rate base recognition to OPEB in Part 65." *RAO 20 Rulemaking* ¶¶ 25, 28.[5]

[5] Because the Commission's pre-1997 rate base regulations were unambiguous, any new interpretation of those regulations to require deduction of OPEBs would receive no deference. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (deference to an agency's

Finally, Verizon's compliance with the Commission's contemporaneous interpretation of its rules — which "d[id] not specifically provide" for deduction of OPEBs from the rate base[6] — cannot be grounds for finding that its 1996 tariff filings were unjust or unreasonable. As explained above, in a tariff investigation, the Commission assesses the lawfulness of "particular carrier conduct" against "the obligations imposed by the statute or *previously adopted* Commission rules." *Special Access Tariffs Order* ¶ 8 (emphasis added).

In sum, the Commission has already decided that its prior rules did not require the deduction of OPEBs from the rate base and has no authority to modify its interpretation of those rules or otherwise to find Verizon liable for complying with those rules.

---

interpretation of its regulation "is warranted only when the language of the regulation is ambiguous"). Where a regulation is unambiguous, courts construe the regulation according to its plain meaning and reject any inconsistent agency interpretation, because to defer to such an interpretation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*; *see Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999); *Hoctor v. Department of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996); *Municipal Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1053 (6th Cir. 1995).

[6] *RAO 20 Rescission Order* ¶ 25.